

**EMPLOYER STATUS DETERMINATION
TEXAS & OKLAHOMA RAILROAD CO.**

This is the determination, upon reconsideration, of the Railroad Retirement Board as to the status of the Texas & Oklahoma Railroad Company (T&O) as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. For the reasons set forth below, the Board hereby affirms its previous determination,¹ and finds the T&O to be a covered rail carrier employer under the Acts, from June 1, 1991, the date operations commenced over its rail line. In addition, the Board finds that the individuals performing train service operation for the T&O are covered employees of that company, and should be reported as having performed creditable railroad service under the Acts.

The evidence under reconsideration is that the T&O is a Delaware corporation formed April 22, 1991, chartered to engage in any activity lawful under the General Corporation Law of Delaware. Sometime prior to June 1991, T&O agreed to purchase two segments of track, totaling approximately 351 miles, from the Atchison, Topeka and Santa Fe Railway (Santa Fe). The north section purchased stretches from a yard at Cherokee, Oklahoma south to Orient Junction, Texas; the second segment continues south in Texas from Shaufler to Maryneal. In addition, T&P acquired a 99 year lease of trackage rights between Orient Junction and Shaufler over the intervening track segment which was retained by Santa Fe, and included a yard at Sweetwater, Texas. The Interstate Commerce Commission (ICC) ultimately approved the acquisition in an order served June 3, 1991. See: Texas and Oklahoma R.R. Co.--Acquisition and Operation Exemption--The Atchison, Topeka and Santa Fe Railway Company, Finance Docket No. 31870.

In anticipation of commencing operation, T&O entered into two agreements to provide service over its line. On May 2, 1991, T&O entered into an agreement with Texas North Orient Corporation (Orient).² The agreement recites that T&O:

desires to operate the Rail Lines as a common carrier
for freight transportation and Contractor [Orient] has

¹See Notice No. 92-10, April 3, 1992.

²Texas North Orient Corporation as determined to be an employer under the Acts effective June 1, 1991 (BA No. 3884). Orient files reports of service and compensation of employees performing services under the contract.

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the experience and expertise to furnish the required equipment, manpower and related services necessary to fulfill its obligations hereunder. Railroad desires to hire and retain Contractor to provide service on that portion of the Rail Lines between the Texas-Oklahoma border * * * and Orient Junction, Texas, * * * and between Shaufler, Texas * * * and Maryneal, Texas (the "Texas Segments" of the Rail Lines) * * *.

Section 3 of the agreement sets forth the obligation of Orient to:

provide the personnel and supervision necessary for the maintenance of the Texas Segments and the locomotive power and personnel necessary for the movement of rail cars on the Texas Segments and to perform certain other duties at the direction of Railroad. Subject to the foregoing, Contractor agrees to furnish all necessary equipment, machinery, manpower and support services related to operations on the Texas Segments for freight transportation * * *.

Notwithstanding the services and duties provided or performed by Contractor hereunder, the parties acknowledge and agree that Railroad is the owner and operator of the * * * Texas Segments, and that for all purposes relating to ownership and operation of the Texas Segments * * * Railroad shall be the operator * * * and the common carrier for the freight transportation services provided on the Texas Segments. * * * All contracts for freight transportation over the Texas Segments shall be in the name of Railroad and Railroad shall be responsible for the operating policies, billing rates and scheduling of transportation over the Texas Segments and the relationship with all shippers.

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On May 6, 1991, T&O entered into a second agreement with the Rio Grande Pacific Corporation (Rio Grande)³ for the operation of the remaining portion of T&O line between Cherokee, Oklahoma and the Texas-Oklahoma border, identified as the "Oklahoma Segment". Section 3 of the Rio Grande agreement also states that:

The parties acknowledge and agree that Railroad is a common carrier and has and shall continue to have during the Term [of the contract] complete and exclusive control over the Rail Lines, including the Oklahoma Segment, and all rail freight transportation operations on the Rail Lines. Subject to the foregoing, Contractor agrees to furnish all necessary equipment, machinery, manpower and support services related to Railroads's operation of the Oklahoma Segment as a shortline railroad for freight transportation * * * .

T&O began operations June 1, 1991, interchanging freight in interstate commerce with Santa Fe. However, T&O conducts all operations through the two operating agreements, and maintains no employees on its own payroll. For this reason, T&O argues that it cannot be an employer under the Acts. Consistent with its claim, T&O has filed annual reports of creditable compensation for the years 1991, 1992, and 1993 pursuant to regulations of the Board at 20 CFR 209.6 which show no employees for these years. See exhibits 18, 19, and 20.

³Rio Grande was incorporated as a Texas corporation on May 3, 1986. Employees of a subsidiary of Rio Grande, the Wichita, Tillman & Jackson Railway Company, Inc. (BA No. 3878) operated the TKO line pursuant to TKO's contract with the Rio Grande. Wichita, Tillman & Jackson Company has reported service and compensation for employees performing services under the control.

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Section 1(a)(1)(i) of the Railroad Retirement Act and sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act define the term "employer" to include a carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission. See 45 U.S.C. §§ 231(a)(1)(i), 351(a) and 351(b). As there is no evidence that T&O is affiliated with any rail carrier, the initial question presented is whether T&O meets the definition of a covered rail carrier employer under the Acts.

The evidence clearly supports a conclusion that T&O is a rail carrier employer. In the verified notice of exemption which T&O filed with the Interstate Commerce Commission May 1, 1991, in ICC Finance Docket No. 31870, T&O itself stated that:

Applicant will be both the owner and the rail operator of the [two former Santa Fe] Rail Lines, assuming full responsibility for marketing freight traffic, setting freight rates, billing for rail service and equipment, providing rail service, supplying cars and maintaining the rail lines.
(Exhibit 13-2).

The details of the proposed transaction were later incorporated into the Notice of Exemption granted by the ICC June 3, 1991 (Exhibit 5). Moreover, the T&O contracts with Orient and with Rio Grande, as noted above, explicitly allocate to T&O all responsibilities for conduct of rail carrier service. The fact that T&O has no employees, but rather contracts with carriers that provide employees to conduct operations does not mean that T&O is not an employer under the Acts. It is its status as a carrier subject to ICC jurisdiction that renders its a covered employer.

Accordingly, the Board on reconsideration reaffirms its initial decision that the Texas and Oklahoma Railroad has been a covered rail carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since June 1, 1991, the date operations commenced.

Glen L. Bower

TEXAS & OKLAHOMA RAILROAD CO.

V. M. Speakman, Jr.

Jerome F. Kever

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TEXAS & OKLAHOMA RAILROAD CO.

TO: The Board

FROM: General Counsel

SUBJECT: Texas & Oklahoma Railroad Company, Inc.
Employer Status - Reconsideration

Attached is a draft determination on reconsideration that the Texas & Oklahoma Railroad Company, Inc. is a covered employer. The draft determination also finds that certain individuals performing train service under contract are covered employees.

The proposed ruling finds that the individuals performing train service on two segments of the T&O line under the contract between T&O and Texas North Orient Corporation and with Rio Grande Pacific Corporation, should be considered employees of the rail carrier and that their service should be creditable under the Acts. The Board has previously held that other common carrier related services, such as maintenance of way, maintenance of signals and car repair, can be contracted out. This proposed decision distinguishes the operation of the trains from these types of services and holds that these services are so essential to the carrier's obligations that the individuals who perform these services should be considered employees of the rail carrier.

Catherine C. Cook

Attachment

TEXAS & OKLAHOMA RAILROAD CO.

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INDEX TO EXHIBITS

EXHIBITS

1. Texas and Oklahoma R.R. Co, - Acquisition and Operation Exemption - The Atchison, Topeka and Santa Fe Railway Company - I.C.C. Finance Docket No. 31870, service date May 20, 1991.
2. Texas and Oklahoma R.R. Co., - Acquisition and Operation Exemption - The Atchison, Topeka and Santa Fe Railway Company - I.C.C. Finance Docket No. 31870, service date May 23, 1991.
3. May 24, 1991, Railroad Board letter seeking employer information.
4. May 31, 1991, letter from the Association of American Railroads, assigning carrier identification codes for the Texas and Oklahoma Railroad.
5. Texas and Oklahoma R.R. Co., - Acquisition and Operation Exemption - The Atchison, Topeka and Santa Fe Railway Company - I.C.C. Finance Docket No. 31870, service date June 3, 1991.
6. August 6, 1991, Railroad Retirement Board letter regarding its authority to obtain employer information.
7. October 7, 1991, Railroad Retirement Board letter regarding its authority to obtain employer information.
8. October 17, 1991, Letter from attorneys from Texas and Oklahoma Railroad requesting Railroad Retirement Board to contact the railroad directly.
9. (Undated) Texas and Oklahoma Railroad letter stating it has no employees.
10. November 12, 1991, Record of telephone conversation between Railroad Retirement Board and President of Texas and Oklahoma Railroad.
11. November 18, 1991, Railroad Retirement Board letter

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forwarding copies of earlier correspondence to Texas and Oklahoma Railroad.

12. November 25, 1991, Texas and Oklahoma Railroad letter providing employer information.
13. May 3, 1991, verified notice of exemption filed by Texas and Oklahoma Railroad in I.C.C. Finance Docket No. 31870.
14. April 3, 1992, Initial determination of employer status, Texas and Oklahoma Railroad Co., attaching decision of March 24, 1992.
15. April 3, 1992, Railroad Retirement Board letter notifying employer of initial determination.
16. April 10, 1992, Texas and Oklahoma Railroad Letter contesting initial determination of employer status.
17. June 15, 1992, Railroad Retirement Board letter, providing administrative record and requesting additional information.
18. 1991 Annual Report of Creditable Compensation.
19. 1992 Annual Report of Creditable Compensation.
20. 1993 Annual Report of Creditable Compensation.